BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA F. TITTEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,033,927
AQUILA, INC.	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 10, 2009, Award of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was awarded a 14 percent permanent partial general disability for the injuries suffered on October 6, 2006, but denied a work disability under K.S.A. 44-510e, after the ALJ determined that the task loss opinion of Pedro A. Murati, M.D., was unsupported by this record. The ALJ further determined that the opinion of claimant's treating physician, board certified orthopedic surgeon Alan J. Moskowitz, M.D., that claimant had no restrictions, was the most credible.

Claimant appeared by her attorney, Mitchell W. Rice of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, William Richerson of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 3, 2009.

ISSUE

What is the nature and extent of claimant's disability? More particularly, does claimant qualify for a work disability after suffering an injury on October 6, 2006?

FINDINGS OF FACT

Claimant had been working for respondent for over 20 years when, on October 6. 2006, she was struck on the head by the bucket on a bucket truck. Claimant was wearing a hard hat and does not remember falling. She was able to finish her day of work. Later that day, she developed a headache. The accident happened on a Friday. By the following Monday, claimant was feeling strange with tingling in her arms, her neck hurt and her left leg was falling asleep. Claimant was referred to Steven A. Tyree, M.D., for an evaluation. Dr. Tyree ordered x-rays and physical therapy and prescribed anti-inflammatory medication. The conservative measures did not help claimant, and she was referred to Dr. Moskowitz for an examination on January 22, 2007. Dr. Moskowitz ordered x-rays and an MRI and gave claimant epidural injections in her low back. The MRI showed mild degeneration at L5-S1 but little else. Dr. Moskowitz did not believe claimant was a candidate for surgery.

Claimant continued to work performing her regular duties for respondent, while being treated by both Dr. Tyree and Dr. Moskowitz. Dr. Moskowitz found nothing about claimant's condition to warrant restrictions or any limitations on her ability to perform her job with respondent. Claimant expressed no concerns about her ability to perform her regular job duties. The only time missed by claimant occurred when she attended medical appointments. Claimant was last examined by Dr. Moskowitz on June 7, 2007, at which time claimant was released and Dr. Moskowitz recommended no work restrictions. Claimant never complained to Dr. Moskowitz that she was unable to perform her duties for respondent, nor that she needed any accommodation on the job. Dr. Moskowitz was asked to review a task list created by vocational expert Robert W. Barnett, Ph.D. In considering the 18 tasks on the list, Dr. Moskowitz determined that claimant could perform all of the tasks.

Claimant was referred by her attorney to board certified independent medical examiner Pedro A. Murati, M.D., for an examination on January 3, 2008. This was approximately 15 months after claimant's date of accident. Claimant had been working for respondent in her regular position performing her job without restrictions the entire time. Dr. Murati diagnosed claimant with low back pain with radiculopathy, myofascial pain syndrome affecting the bilateral shoulder girdles and the cervical and thoracic paraspinals, neck pain secondary to cervical sprain and early bilateral carpal tunnel syndrome from her work activities. Claimant was rated at 28 percent to the whole person pursuant to the fourth edition of the AMA *Guides*.[1] Claimant was restricted from climbing ladders, crawling, above shoulder work with both arms, lift/carry, push/pull greater than 10 pounds, rarely bend/crouch/stoop, occasional sit, climb stairs, squat, drive and lift 10 pounds, frequently stand, walk, and lift 5 pounds, no work more than 18 inches away

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

from the body with both arms, avoid awkward positions of the neck and alternate sit, stand and walk. In determining his restrictions, Dr. Murati made no inquiry of claimant as to her job duties or what she was capable of doing on the job. When presented with the task list of Dr. Barnett, Dr. Murati found claimant incapable of performing 15, for a task loss of 83 percent.

When claimant was presented with Dr. Murati's restrictions, she objected, noting first that she had continued and could continue to perform her job with respondent, even though the restrictions from Dr. Murati indicated otherwise. Additionally, she objected to her attorney's staff that the restrictions from Dr. Murati would cause her to lose her job with respondent. She was advised by her attorney's office staff that she had to present the restrictions to respondent, as "it was the law".[2] When the restrictions from Dr. Murati were presented to respondent, respondent was unable to accommodate them and claimant's job with respondent was terminated. At the regular hearing, claimant testified that she still had the ability to perform the work for respondent and the only reason for the termination was the restrictions of Dr. Murati. At the time of the regular hearing, claimant had requested no additional medical treatment and none was recommended. Claimant found alternative employment earning $263.25 per week,[3] representing a 69.4 percent wage loss.

Dr. Murati acknowledged that claimant had suffered two earlier injuries to her neck from prior motor vehicle accidents. He was provided no records from those accidents, but rated claimant's neck as part of his functional impairment including any residual problems from those earlier accidents. Dr. Murati diagnosed claimant with "apparent early bilateral carpal tunnel syndrome, not related to the fall, but due to her work duties."[4] However, on cross-examination, when asked if he performed grip strength testing of claimant, he stated that since claimant did not come with symptoms concerning carpal tunnel syndrome, and "neither did I diagnose her, so we don't do grip strengths on people that have - - unless she had problems with carpal tunnel syndrome or problems in the lower upper extremities - - or in the distal upper extremities, I would not have done grip strengths, no."[5] This discrepancy is not explained in this record. When Dr. Moskowitz was asked about Dr. Murati's statement that claimant had a disc bulge at L4-L5 which

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[2] Claimant Depo. at. 44.

[3] Claimant's pre-injury average weekly wage was $860.00.

[4] Murati Depo. at 13.

[5] Murati Depo. at 37.

probably was the reason claimant was having low back problems, Dr. Moskowitz stated that was a "false statement".[6] Dr. Moskowitz stated that a bulging disc never causes pain, "it's non-path-logic, it's a consequence of aging and so that cannot be stated."[7] However, he did find mild disc degeneration at L5-S1, and a mild bulge at L3-4, where claimant also underwent epidural injections at Dr. Moskowitz' direction. Dr. Moskowitz also determined that Dr. Murati's restrictions were inappropriate, especially for someone who admitted to being able to do the work and who was actually performing the job.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[6] Moskowitz Depo. at 11.

[7] Moskowitz Depo. at 11-12.

[8] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2006 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]
>
> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[12]

There is no dispute that claimant suffered a work-related accident which entitled her to benefits for a 14 percent whole body functional impairment under the Kansas Workers Compensation Act. The dispute centers around claimant's ability to retain her employment with respondent.

Here, claimant continued performing her regular job without accommodation for 16 months after her accident. Claimant acknowledged that she had both the desire and the ability to do the job. However, her attorney apparently had ongoing concerns regarding claimant's true functional impairment or claimant's ability to perform that work safely. The decision by claimant's attorney to send claimant to Dr. Murati could have come from an abundance of caution. Dr. Murati's findings and report appear to question claimant's ability to safely remain at work.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[13] and *Copeland.*[14] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

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[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[12] K.S.A. 44-510e.

[13] *Foulk, supra.*

[14] *Copeland, supra.*

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[15]

An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland.*[16] But the Board will follow *Foulk* and *Copeland* until the appellate courts rule they are no longer applicable.

Claimant had returned to work and displayed the ability to perform her job without restriction. While the restrictions placed on her by Dr. Murati ultimately cost claimant her job, they apparently were intended to protect claimant from future harm. Claimant resisted providing those restrictions to respondent and did so only after her attorney's office staff insisted. And claimant was not attempting to manipulate the workers compensation system when she presented Dr. Murati's restrictions to her employer.

The Board finds claimant did not violate the good faith requirement of *Copeland*. Instead, the Board finds claimant lost her job as a direct result of this accident; i.e., presenting respondent with restrictions she had obtained in the course of this claim. Therefore, claimant's wage loss percentage must be based on her actual wage loss. The end result of this matter is that claimant, once earning $860.00 per week, is now working in the open labor market earning far less in wages than before her injury or when she was with respondent. When comparing claimant's average weekly wage of $860.00 to her current wage of $263.25, the Board finds that claimant has suffered a wage loss of 69 percent.

K.S.A. 44-510e has a second element which the Board must consider. Claimant has suffered a task loss pursuant to the opinion of Dr. Murati. However, claimant's treating physician, Dr. Moskowitz, determined that claimant had retained the ability to perform all of the tasks from the fifteen years preceding the accident. The Board finds the opinion of Dr. Moskowitz to be the most credible and finds claimant has suffered no task loss as the result of this accident. Although Dr. Moskowitz did not consider claimant's injury to require restrictions, claimant lost her job as a direct result of her injury. As such, a work disability

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[15] *Id.* at 320.

[16] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007), and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

is appropriate. In averaging a wage loss of 69 percent with a zero percent task loss, claimant has suffered a permanent partial general disability of 34.5 percent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a permanent partial general disability of 34.5 percent for the injuries suffered on October 6, 2006.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated February 10, 2009, should be, and is hereby, modified to award clamant a 34.5 percent permanent partial general disability for the injuries suffered on October 6, 2006, while working for respondent.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Donna F. Tittel, and against the respondent, Aquila, Inc., and its insurance carrier, Ace American Insurance Company, for an accidental injury which occurred October 6, 2006, and based upon an average weekly wage of $860.00.

Claimant is entitled to 143.18 weeks of permanent partial disability compensation at the rate of $483.00 per week totaling $69,155.94 for a 34.5 percent permanent partial work disability, making a total award of $69,155.94. As of July 13, 2009, the entire amount is due and owing and is ordered paid in one lump sum less amounts previously paid.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[17]

[17] K.S.A. 44-536(b).

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the opinion of the majority. Claimant had been returned to work for respondent, earning a comparable wage and requiring no restrictions for 16 months.

K.S.A. 44-510g(a) states in part:

> A primary purpose of the workers compensation act shall be to restore the injured employee to work at a comparable wage.

Here, that intent had been accomplished. Claimant continued performing her regular job without accommodation for 16 months after her accident. Claimant acknowledged that she had both the desire and the ability to do the job.

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the

> employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[18]

The decision by claimant's attorney to send claimant to Dr. Murati is contradictory to the statutory purpose of the Workers Compensation Act. Dr. Murati's findings and report, even if accepted in their entirety, appear to undermine claimant's desire and ability to remain at work. The actions by her attorney's office in requiring claimant, over her protests, to provide the report to respondent, even after claimant cautioned that it would cost her the job, are confusing. Perhaps there was a desire to increase claimant's work disability. But, as claimant was working for wages at or greater than 90 percent of her average weekly wage from the date of accident, this could only be accomplished if claimant lost her job. If the intent of claimant's attorney was to cost claimant her job, then he was successful. If the intent was to best benefit claimant, then he failed miserably. Claimant, even if she qualified for a work disability, is limited by K.S.A. 44-510f to a maximum award of $100,000.00, of which her attorney would take 25 percent. But such an award would result in a wage loss of 69 percent, based on claimant's current wage as compared to her average weekly wage on the date of accident. This would create an annual income loss of over $31,000.00 per year. Again, the logic of claimant's attorney's actions is lost to this Board Member.

This Board Member also finds the evaluation and report of Dr. Murati to raise significant questions. The findings of Dr. Murati's examination are contradictory. He diagnosed claimant with bilateral carpal tunnel syndrome, but acknowledged that he did no grip strength testing as claimant had no symptoms of carpal tunnel syndrome. He stated under oath that the attorney paying him was his client. Therefore, the intent of his evaluation could be to maximize the financial benefit for the attorney while damaging the claimant's future. When advised that he had accomplished just that, his callous reply involving mailing claimant "a box of tissues" was startling. Dr. Murati also formulated restrictions for claimant without input from claimant regarding her job duties or what she felt she could do. Finally, he also diagnosed claimant with a neck impairment, but acknowledged that he had no reports from two earlier automobile accidents, both involving injuries to claimant's neck. The ALJ found the opinion of Dr. Murati to display an utter disregard for its impact on claimant's ability to retain her employment. This Board Member agrees with this analysis and would find Dr. Murati's opinion to lack credibility. Claimant displayed both an ability and a willingness to continue working for respondent, while earning a comparable wage. This was only undermined by the medical opinion of Dr. Murati. The opinion of Dr. Moskowitz, claimant's treating physician, that claimant had no task loss and had the ability to return to her regular job without restrictions is

[18] K.S.A. 44-510e.

supported by this record. The decision of the ALJ denying claimant a work disability should be affirmed.

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the opinion of the majority. It is undisputed claimant retained the actual ability to perform her job after her accidental injury. She continued working without restriction for sixteen months. But she then presented respondent with Dr. Murati's restrictions knowing that respondent could not provide accommodation and she would be terminated from her job. Whatever compelled her to present the restrictions, she knew that they were not appropriate and that she could perform all her job duties without complaint. Her action in presenting the restrictions with the knowledge that they were not appropriate and the knowledge respondent would have no alternative but to terminate her employment simply does not demonstrate a good faith effort to retain her employment. Consequently, I would impute the wage she was earning at the time her job was terminated and affirm the ALJ's denial of a work disability.

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
William Richerson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge